FILED

No. 961780 MAY 6 1997

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In The

Supreme Court of the United States

October Term, 1996

THE MEMBERS OF THE DISCIPLINARY BOARD OF THE SUPREME COURT OF THE STATE OF NEW MEXICO, Luis G. Stelzner, Chairman, Christina Armijo, Linda S. Bloom, Felix Briones, Jr., Michael D. Bustamante, Charles W. Daniels, Patricia B. Murray, Larry Ramirez, Warren F. Reynolds, Alex Romero, John H. Schuelke and Sarah M. Singleton, members, in their official capacities,

Petitioners,

vs.

M. TERRENCE REVO,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a State may prohibit direct mail solicitation of accident victims by attorneys when the record demonstrates harm resulting from the proscribed practice and when other forms of communication remain available to provide pertinent information to consumers of legal services.

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JURISDICTION

The court of appeals entered its judgment on February 5, 1997. (App. A.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND RULE INVOLVED

Amendment I, United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment XIV, Section 1, United States Constitution:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of

> law; nor deny to any person within its jurisdiction the equal protection of the laws.

New Mexico Rule of Professional Conduct 16-701(C)(4):

> C. Prohibited Solicitations. A lawyer may not send or permit to be sent a written communication to a prospective client for the purpose of obtaining professional employment, or engage in the in-person or telephone solicitation of legal business allowed by these rules if:
>
> . . . .
>
> (4) the written communication or other solicitation, except as provided in Paragraph A of Rule 16-703, concerns an action for personal injury or wrongful death or otherwise relates to an accident involving the person to whom the communication is addressed or a relative of that person.

STATEMENT OF THE CASE

In 1992, the year the New Mexico Supreme Court adopted a rule banning all attorney direct mail solicitation of personal injury victims and family members of wrongful death victims, New Mexico consumers were awash in information about the availability of attorney services. It was impossible to drive on any Albuquerque freeway without seeing enormous billboards touting lawyers. Signs emblazoned with lawyers' smiling faces implored consumers to "call now." Smaller versions of

the same advertisements greeted visitors to Albuquerque's airport. Television commercials filled daytime programs and continued long after the local news in the evening. Radio advertising describing accident victims' need for an attorney was found on virtually all stations. The yellow page directory had, as its single largest source of customers, lawyers announcing their ability to obtain compensation for the injured, relief for the debt-ridden, and acquittal for the criminally charged. There were advertisements in newspapers and magazines, on the sides of busses and on the inside of grocery carts.

In addition to these mass market advertisements, the Supreme Court of New Mexico supervised a lawyer referral service to assist persons with questions about the law and to direct members of the public to lawyers appropriately specialized to handle many problems over the phone. This service operated without charge to the public.

Finally, certain plaintiffs' lawyers solicited business through the use of letters sent directly to the homes of accident victims and their families. The lawyers obtained information from police reports of automobile accidents, then their staffs would prepare form letters urging these individuals to call the attorney (at no charge) to review their case and their potential claims for compensatory and punitive damages. Hundreds of such letters were sent each month, many of which were followed up by telephone solicitations from the attorneys' offices. These letters often were modeled after those suggested by self-styled "experts" on direct mail techniques such as the Richard Shapero of *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988). *See* Appendix D.

In viewing this wide spectrum of both means and content of information regarding legal services, the New Mexico Supreme Court became concerned that the greatest danger to the integrity of the legal profession came from the practice of direct mail solicitation. In order to protect against potential charges of fraud and abuse by overzealous attorneys anxious to capitalize on the misfortune of others, the court decided to amend its regulatory framework by enacting N.M. Rule of Professional Conduct 16-701(C)(4). This rule prohibited New Mexico attorneys from sending written communications to accident victims or their families. The rule did not prohibit other forms of lawyer advertising.

Respondent M. Terrence Revo is one of the lawyers who relied upon direct mail solicitation of accident victims to build his practice. In certain months, he sent out as many as nine hundred separate letters. In August 1992, Mr. Revo filed suit in federal district court for the District of New Mexico, challenging Rule 16-701(C)(4), and asserting claims under 42 U.S.C. § 1983 for violation of the First and Fourteenth Amendments to the United States Constitution. The jurisdiction of the district court was invoked under 28 U.S.C. § 1331 (general federal question jurisdiction).

During the course of this litigation, the Disciplinary Board of the Supreme Court of New Mexico commissioned a community attitude survey to measure public attitude and perceptions of direct mail advertising by attorneys. The survey found that the overall public response to these letters was negative, primarily because this form of solicitation was viewed as unprofessional, that it constitutes an invasion of privacy and that it

encourages people to file lawsuits. Less than twenty percent of those interviewed thought that the letters provided helpful information. *See* Appendix C.

The survey also revealed that those adults with lower educational levels and lower household incomes are significantly more likely to view lawyers who send these letters as more experienced, more skillful, more dedicated and of better quality. A majority of these same groups also believed that, in order to send these letters, these lawyers were required by the New Mexico Supreme Court to be experienced in the trial of automobile accident cases. *See id.*

REASONS FOR GRANTING THE PETITION

I. The Lower Court's Decision, Striking Down New Mexico's Reasonable And Factually Grounded Ban on Attorney Direct Mail Solicitation Of Accident Victims, Resulted From Conflicting And Confusing Decisions Governing State Regulation Of Lawyer Solicitation And Other Commercial Speech That Must Be Addressed By This Court.

In *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), this Court held that truthful advertising of routine legal services by attorneys was a form of commercial speech entitled to a modicum of protection under the First Amendment. Dissenting from this part of the Court's holding, Justice Powell ruminated that, despite the Court's attempt to narrow its holding,

> it is clear that within undefined limits today's decision will effect profound changes in the

> practice of law, viewed for centuries as a learned profession. The supervisory power of the courts over members of the bar, as officers of the courts, and the authority of the respective States to oversee the regulation of the profession have been weakened.

Id. at 389 (Powell, J., concurring in part, dissenting in part). Eleven years later, the dissent in *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988), echoed this same theme. Rejecting the majority's conclusion that the First Amendment barred a state from categorically prohibiting lawyers from soliciting legal business by sending letters to potential clients, Justice O'Connor found that *Bates* "has proved to be problematic in its application," and urged the Court to "return to the States the legislative function that has so inappropriately been taken from them in the context of lawyer advertising." *Id.* at 487 (O'Connor, J., dissenting). Reflecting on the "folly" of "a constitutional theory that refuses to recognize either the essence of professionalism or its fragile and necessary foundations," the dissent "hope[d] that the Court will recognize the danger before it is too late to effect a worthwhile cure." *Id.* at 491.

In New Mexico, Justice Powell's prediction has proven to be prophetic. No longer do lawyers view advertising as means to provide consumers with information; instead, attorneys resort to such declarations in order to gain a competitive advantage over their peers. Attorneys announce toll-free telephone numbers such as "1-800-LAWSUIT." One lawyer places his six-foot high portrait on a billboard alongside a three-dimensional

crashed car extending from the sign. Television ads display attorneys handing checks to actors posing as happy clients after having received their litigation proceeds. Potential clients are urged to join the "winning team" or go with the "aggressive lawyer." Bumper stickers warn other drivers to "Back Off! My attorney is. . . . " Other lawyers provide wristwatches with their pictures and the slogan, "I sue drunk drivers."

This Court took a significant step toward allowing states like New Mexico to respond to such indignities in *Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371 (1995), by upholding a ban on the use of targeted direct mail solicitations of victims and their relatives for thirty days following an accident or disaster. In so doing, the Court embraced the notion that " 'States have a compelling interest in the practice of professions within their boundaries, and . . . as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions.' " *Id.* at 2376 (quoting *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975)); *see Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 460 (1978) ("In addition to its general interest in protecting consumers and regulating commercial transactions, the State bears a special responsibility for maintaining standards among members of the licensed professions.").

The present case affords the Court the opportunity to clarify further the boundaries of permissible state regulation of attorney advertising. The specific question before the Court is whether a state can impose a categorical ban on one form of communication where the factual record supports the appropriateness of such a ban and where the

same information is available to consumers in other forms. The larger issue, however, pertains to the confusion inherent in this Court's most recent pronouncements on commercial speech. As this case illustrates, this confusion creates uncertainties which hamper the efforts of states to regulate potentially harmful conduct within the legal profession.

The most significant area of confusion which requires clarification by this Court concerns the manner in which total prohibitions on speech afforded First Amendment protection are to be evaluated. In *Shapero*, the Court relied on the analysis put forward in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980), for measuring a state's ban on a type of commercial speech. In *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495 (1996), the Court fractured over this same issue and was unable to reach a single conclusion that captured a majority of the Court. *Compare id.* at 1506-07 (Stevens, J.) ("although the special nature of commercial speech may require less than strict review of its regulations special concerns arise from 'regulations that entirely suppress commercial speech in order to pursue a nonspeech-related policy.'") (quoting *Central Hudson*, 447 U.S. at 566 n.9), *with id.* at 1518-19 (Thomas, J., concurring in judgment) (rejecting application of *Central Hudson* analysis in commercial speech cases), *with id.* at 1521 (O'Connor, J., concurring in judgment) ("I would resolve this case more narrowly . . . by applying our established *Central Hudson* test to determine whether this commercial-speech regulation survives First Amendment scrutiny."). The instant case offers the Court an opportunity to revisit this issue, provide guidance and reach consensus as to the level of

scrutiny required in commercial speech cases and whether the *Central Hudson* analysis continues to apply in instances of a flat ban on commercial speech.

Another area of confusion engendered by this Court's recent pronouncements regards the proper measure of the relationship between the State's interests and the means chosen to serve them. In the present case, although the lower court properly measured the "fit" between the ends served by the challenged rule and the means chosen to accomplish those goals by taking into account the availability of less burdensome means of regulation, the court nonetheless ignored the equally compelling consideration that, "[i]f alternative channels permit communication of the restricted speech, the regulation is more likely to be considered reasonable." *44 Liquormart*, 116 S. Ct. at 1521 (O'Connor, J., concurring in judgment); *see Florida Bar*, 115 S. Ct. at 2380-81. The distinction between these two perspectives is the difference between whether the First Amendment protects a particular mode of commercial communication rather than the substance of the information actually provided to consumers.

The present case sits at the intersection of these two conflicting principles. It is conceivable that New Mexico could have devised other forms of regulation which would not have prohibited any form of lawyer advertising in its entirety. To fault the State for not enacting this type of rule is to recognize the primacy of the method of communication in the First Amendment's protection of commercial speech. There also can be no doubt, however, that New Mexico's ban on a single form of communication – direct mail solicitation of accident victims and their

families – in no way restricts the information which consumers remain able to receive. Indeed, the entire panoply of legitimate promotional avenues continues to be available to New Mexico lawyers. They may advertise on prime time television and radio, as well as use newspapers and other media. They may rent space on billboards. And there are literally scores of pages of yellow pages devoted exclusively to lawyers, organized both alphabetically and by area of specialty. *See generally* N.M. Rule of Professional Conduct 16-702(A) ("[A] lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor billboards or signs, radio or television, or through written communication."). The lower court ignored these alternative forms of communication which assure "the free flow of commercial information" which this Court has found to be at the core of its "recent decisions involving commercial speech." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 646 (1985).

The potential conflict between these two interests has manifested itself in other cases involving lawyer advertising. In *Shapero*, the Court emphasized the importance of protecting a single form of communication by holding that "a State may [not] . . . categorically prohibit lawyers from soliciting legal business for pecuniary gain by sending truthful and nondeceptive letters to potential clients known to face particular legal problems." 486 U.S. at 468. In *Florida Bar*, however, the Court ruled that a thirty day prohibition on targeted direct mail solicitations was constitutionally permissible. In so doing, the Court stressed that it would have held otherwise "if there were not many other ways for injured Floridians to learn about the

availability of legal representation during that time." 115 S. Ct. at 2380.

This Court needs to provide direction as to which of these two factors should be given deference. If the primary constitutional concern is with assuring that consumers receive a full range of commercial information, regardless of its source, then this signal is not being accurately received and should be strengthened by this Court.

II. The Challenged Rule Is Narrowly Tailored To Serve Substantial Governmental Interests And Does Not Violate The First Amendment To The United States Constitution.

Attorney advertising falls within the scope of commercial speech which this Court has afforded only " 'a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values' and [which] is subject to 'modes of regulation that might be impermissible in the realm of noncommercial expression.' " *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 477 (1989) (quoting *Ohralik*, 436 U.S. at 456). "[T]he 'least restrictive means' test has no role in the commercial speech context". *Florida Bar*, 115 S. Ct. at 2380. Instead, the means selected by the state for effectuating its interests need only represent "a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served, that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective." *Id.*

(internal quotation omitted). The lower court in this case noted, "This final element of the test is New Mexico's undoing." *Revo v. Disciplinary Bd. of the Supreme Court for the State of New Mexico*, 106 F.3d 929, 935 (10th Circuit 1997).

The lower court, misapplying the majority opinion in *Florida Bar*, found that a ban extending beyond thirty days was improper in that it was "as broad in scope and duration as it can possibly be". *Id.*; *see also id.* at 936. The lower court then noted "the Board has not shown why a thirty-day ban similar to Florida's would not adequately address the harms it has identified." *Id.* at 936. The court also observed that the state had failed to show that less-burdensome alternatives "would be insufficient to materially address [the State's] concerns." *Id.* at 935. This ruling epitomizes the confusion engendered by this Court's pronouncements.

The lower court's suggestion that New Mexico's ban was excessive for not adhering to the thirty day limitation approved in *Florida Bar* demonstrates the problems that arise when a lower court fastens onto what it perceives to be the "rule" of the case instead of focusing upon the adequacy of the record developed in support of the challenged restriction, as this Court mandates. *See Florida Bar*, 115 S. Ct. at 2377 ("[A] governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.").

First, the thirty day barrier set forth in *Florida Bar* was not a limitation imposed by this Court and, indeed,

has no special constitutional significance whatsoever. Instead, it represents nothing more than a restriction imposed by Florida itself, perhaps intimidated no differently than the Eleventh Circuit by the notion that this Court's rulings since *Bates* prohibit any meaningful limitation on lawyer advertising. *See McHenry v. The Florida Bar*, 21 F.3d 1038, 1045 (11th Cir. 1994) ("We are disturbed that *Bates* and its progeny require the decision we reach today."). In fact, the Court granted only what the Florida Bar requested, and nowhere established an artificial time barrier on permissible limitations on commercial speech which cannot be exceeded by other state regulations.

Second, New Mexico's record shows precisely why a thirty day ban similar to Florida's would not address the harms New Mexico has identified with letters of solicitation. At trial, the Disciplinary Board presented evidence regarding the impact that letters of solicitation had on the family members of accident victims. One New Mexico mother, for example, lost her high school aged daughter in an automobile accident. She described the incessant pain from the repeated letters which she received from soliciting lawyers over a seven-month period, each of which opened the wounds again through both their timing and their content. She also described her resulting revulsion with the legal profession.

Dr. Joan Gunzelman, Ph.D., a psychologist practicing exclusively as a grief counselor, testified about the separate and distinct stages of grieving which people go through when they lose a family member. Her uncontradicted testimony was that the grieving process can go on for years, producing an intense and disabling emotional state which lasts longer when the death is caused

by an accident or unanticipated incident. As a result, the idea that a thirty day moratorium somehow lessens the intrusiveness of the letters of solicitation or softens their impact does not fit the reality of what occurs when people lose a family member.

As a consequence of the lower court looking solely to the perceived bright-line "rule" set forth in *Florida Bar* rather than examining the record developed by the State in support of its regulation, New Mexico has been deprived of the opportunity to fashion reasonable rules that conform to the contours of its own experience. This result fatally skews the process of constitutional review, and ensnares the federal courts in the unnecessary task of measuring the validity of state regulations against artificial constraints with no bearing on the immediate harm sought to be addressed. *See Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91, 119 (1990) (O'Connor, J., dissenting) ("Failure to accord States considerable latitude in this area embroils this Court in the micromanagement of the State's inherent authority to police the ethical standards of the profession within its borders.").

In measuring the effect of New Mexico's restriction on the one aspect of commercial speech represented by direct mail solicitation by lawyers, the lower court ignored the critical role played by the alternative channels available for communicating the content of the information contained in the restricted mode of speech. *See Florida Bar*, 115 S. Ct. at 2380-81. As a result of its failure to take into account the ample alternative channels actually used for communicating the same information, the lower court determined that New Mexico's regulation

prevented the flow of truthful information. This erroneous conclusion perversely altered the lower court's consideration of the record developed by the State. The court's faulty perspective is reflected in its observation that "[t]he Board argues that the harms it has identified are without time limits, and that grieving does not fit into a neat thirty day cycle. This may be true, but the Constitution favors disclosure of information, even in the commercial speech context." *Revo*, 106 F.3d at 936. Further:

> The Board has shown that it has significant interests in protecting the emotional well-being of members of the public and in assuring that individuals responding to direct-mail solicitations will be represented by competent attorneys. The Board has failed, however, to demonstrate that its interests outweigh the public's right to at some point receive truthful and non-misleading written advertising that is plainly and conspicuously marked 'Advertising Material' or 'Lawyer Advertising.'

Id. Had the lower court considered the many alternative channels existing for effectively communicating the same information, it would have been clear that the challenged regulation adequately preserved the public's right "to at some point receive truthful and nonmisleading written advertising," and protected the disclosure of information to consumers.

Indeed, New Mexico has chosen to restrict only a single form of lawyer advertising – and even then only as it applies to personal injury lawsuits – comprised of the one type of conduct which "has long been viewed as inconsistent with the profession's ideal of the attorney-client relationship and as posing a significant potential

for harm to the prospective client." *Ohralik*, 436 U.S. at 454. As the Supreme Court of New Jersey noted in *In re Anis*, 599 A.2d 1265, 1269 (N.J. 1922), "the form of solicitation at issue here is so universally condemned that its intrusiveness can hardly be disputed." In light of this degree of reprehension, the court concluded:

> Nothing in the Constitution . . . requires us to countenance solicitation that intrudes upon victims or their families in the initial throes of their grief. . . . What we are talking about here . . . is conduct that is patently offensive to the common sensibilities of the community because it intrudes upon the private grief of victims or their families, serves only to compound their sorrow, and solicits representation of them at a moment of their extreme vulnerability.

Id. at 1271.

New Mexico consumers are not being deprived of any unique form of information that they will need to make informed and reliable decisions about their use of legal services. Under the challenged regulation, what they are shielded from is the predatory tactics of some attorneys who seek to obtain a pecuniary gain from another's misery. Such behavior does not warrant constitutional protection, and this Court should return to the states the fullest array of tools with which to restrict such conduct. *See Ohralik*, 436 U.S. at 459 n. 16 (noting that, on an earlier occasion, "[t]he Court implicitly approved of the State's regulation of conduct characterized colloquially as 'ambulance chasing' ".).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

M. TERRENCE REVO, Plaintiff-Appellee, vs. DISCIPLINARY BOARD OF THE SUPREME COURT FOR THE STATE OF NEW MEXICO, LUIS G. STELZNER, Chairman; CHRISTINA ARMIJO, LINDA S. BLOOM, FELIX BRIONES, JR., MICHAEL D. BUSTAMANTE, CHARLES W. DANIELS, PATRICIA B. MURRAY, LARRY RAMIREZ, WARREN F. REYNOLDS, ALEX ROMERO, JOHN H. SCHULKE, SARAH M. SINGLETON, members, in their official capacities, Defendants-Appellants.	)	No. 96-2000 (Filed Feb. 5, 1997)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO
(D.C. No. CIV-92-764-JC)

Andrew G. Schultz, Rodey, Dickason, Sloan, Akin & Robb, Albuquerque, NM (Bruce Hall, Albuquerque, NM, Stephen Durkovich, Albuquerque, NM, and Damon Ely,

Albuquerque, NM, with him on the brief) for Defendants-Appellants.

Charles R. Peifer, Browning & Peifer, P.A., Albuquerque, NM (John Newman Carr, Albuquerque, NM, with him on the brief) for Plaintiff-Appellee.

Before KELLY, HOLLOWAY and WEIS,* Circuit Judges.

KELLY, Circuit Judge.

Defendants, members of the Disciplinary Board of the Supreme Court of New Mexico (the Board), appeal from the district court's order enjoining enforcement of Rule 16-701(C)(4) of the New Mexico Rules of Professional Conduct.[1] Rule 16-701(C)(4) bans all attorney

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* The Honorable Joseph F. Weis, Jr., Senior Circuit Judge for the Third Circuit Court of Appeals, sitting by designation.

[1] 16-701. Communications concerning a lawyer's services.

. . . .

C. Prohibited Solicitations. A lawyer may not send or permit to be sent a written communication to a prospective client for the purpose of obtaining professional employment . . . if:

. . . .

(4) the written communication or other solicitation, except as provided in Paragraph A of Rule 16-703 [allowing contact with prospective clients who are relatives or with whom the lawyer has a prior personal, business or professional relationship], concerns an action for

direct mail advertisements to personal injury victims and family members of wrongful death victims, unless the recipient of the solicitation is a relative of the attorney sending the letter or has had a prior personal, business or professional relationship with that attorney. The district court found the rule unconstitutional, in violation of the First Amendment and the Equal Protection Clause. We exercise jurisdiction under 28 U.S.C. § 1291 and affirm. We grant the Board's unopposed motion to withdraw portions of its appendix not before the district court.

Background

Plaintiff, M. Terrence Revo, is a personal injury lawyer who practices in Albuquerque, New Mexico. He has been a member in good standing of the New Mexico and New York bars since 1978 and 1976 respectively. Following the United States Supreme Court's decision in *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988), Mr. Revo began advertising by means of direct mail letters sent to persons injured in automobile accidents. He continued to do so until 1992, when the Supreme Court of New Mexico enacted Rule 16-701(C)(4), amending its Rules of Professional Conduct to ban all direct mail advertising to personal injury victims and family members of wrongful death victims. S.C.R.A. 16-701 (1995 Repl.) (as amended,

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> personal injury or wrongful death or otherwise relates to an accident involving the person to whom the communication is addressed or a relative of that person.

S.C.R.A. 16-701(C)(4) (Michie 1995 Repl.) (as amended, effective August 1, 1992).

effective August 1, 1992). At the same time that it adopted this complete ban on direct mail to accident victims, New Mexico adopted a procedure for screening all other lawyer advertisements. S.C.R.A. 16-707 (1995 Repl.) (as amended, effective August 1, 1992). By its terms, this screening procedure applies to all direct mail advertisements except those to personal injury victims, which are specifically banned by Rule 16-701(C)(4).

Mr. Revo sought a declaratory judgment that the ban was unconstitutional on First Amendment and Equal Protection grounds, as applied to him and the solicitation letter he proposes to send.[2] After a one-week trial, both

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[2] The advertising letter at issue, as set forth in Mr. Revo's second amended complaint, is as follows:

> [Date] "LAWYER ADVERTISEMENT"
>
> [Name and Address]
>
> Dear [Title and Name]:
>
> The Albuquerque Police [State Police] Department records show that you were recently involved in an auto accident. Unfortunately, such accidents are an all too common fact of life and can cause serious concern. I understand that dealing with injuries, emergency rooms, medical bills, lost earnings, damaged autos, rental cars, and insurance adjusters can be difficult and frustrating.
>
> In our system of legal justice, the injured person has certain rights and protections under the law. It is important that you know about your rights before deciding what to do.
>
> I have been an attorney for more than 16 years. I invite you to make an appointment for a free initial consultation and evaluation of your case. We will do

parties submitted thousands of additional pages of depositions and other documentary evidence for the court's further consideration, and the district court took the matter under advisement. Before rendering a decision, the district judge died. The case was assigned to another district judge, who gave the parties the option under Fed. R. Civ. P. 52 of retrying any part of the case. Waiving their right to retry the case, the parties submitted it on the record. The district court held that New Mexico's blanket ban on direct mail advertising is an unconstitutional violation of Mr. Revo's First Amendment and Equal Protection rights, and permanently enjoined its enforcement. The Board now appeals.

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our best to answer all your questions and you are under no obligation to hire my firm.

I accept personal injury cases on a contingency fee basis, which means that my fee is based upon a percentage of your total recovery, before costs are deducted. Regardless of the outcome, the client will bear the expenses of the case. Some exceptions may apply. I have found that the earlier I become involved in a case, the more I can do on your behalf, therefore, I invite you to call today.

If you have already retained the services of an attorney, I hope that your case will proceed well and that you will have a positive outcome. If you are not represented, then I ask you to think about what is at stake, now and for the future. If we can help please call.

Respectfully,

M. Terrence Revo

Discussion

In a First Amendment case, we have an obligation to make an independent examination of the whole record in order to make sure that the speech regulation does not constitute a forbidden intrusion on the field of free expression. *Melton v. City of Oklahoma City,* 879 F.2d 706, 713 (10th Cir. 1989) (citing *Bose Corp. v. Consumers Union of U.S., Inc.,* 466 U.S. 485, 499 (1984)). Because of this obligation, and because of the unique procedural posture of this case, the Board contends that we owe no deference to the district court's findings and that we should substitute our own independent review of the evidence. Ordinarily, our review of the district court's findings of fact is under the clearly erroneous standard, even if those findings were based on documentary evidence and a cold record. *Anderson v. City of Bessemer City,* 470 U.S. 564, 574 (1985); *United States v. Little,* 60 F.3d 708, 714 n.5 (10th Cir. 1995). This case, however, turns primarily on the application of the First Amendment to the facts surrounding New Mexico's ban. Although the district court also held that the ban violated the Equal Protection Clause, we need not address that holding because the trial record makes it clear that Mr. Revo's equal protection claim was subsumed in his First Amendment claim. We review the district court's findings of constitutional fact and its ultimate conclusions of constitutional law de novo. *Robinson v. City of Edmond,* 68 F.3d 1226, 1230 n.7 (10th Cir. 1995); *Yates v. Commissioner,* 924 F.2d 967, 969 (10th Cir. 1991).

Lawyer advertising is commercial speech and is accorded an intermediate measure of First Amendment protection. *Florida Bar v. Went For It, Inc.,* 115 S.Ct. 2371, 2375 (1995). Government restrictions on commercial

speech, such as New Mexico's ban on personal injury direct mail advertising, are analyzed under the framework set forth in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980). As a threshold inquiry under *Central Hudson*, we must determine whether the particular advertisement is protected speech – *i.e.*, whether it concerns lawful activity and is not misleading. *Id.* at 563, 566; *Went For It*, 115 S. Ct. at 2376. If not, the speech may be freely regulated. Protected commercial speech may also be regulated, but only if the government can show that (1) it has a substantial state interest in regulating the speech, (2) the regulation directly and materially advances that interest, and (3) the regulation is no more extensive than necessary to serve the interest. *Central Hudson*, 447 U.S. at 564-65; *Went For It*, 115 S. Ct. at 2376.

The operative facts in this case are not in dispute, although the parties contest how those facts should be characterized. At issue here is whether, under the *Central Hudson* framework, New Mexico's ban is a constitutionally permissible restriction on the commercial speech of lawyer advertising.

There is no question that advertising legal services concerns lawful activity. The Board argues, however, that the letters Mr. Revo sent to accident victims are misleading. Our review of the record does not support this overbroad contention. As early as 1988, the Board's Chief Disciplinary Counsel admitted that Mr. Revo's letters were "carefully worded to avoid creating false impressions." Aplt. App. at 271. Also, the Board admitted that it had not received a single complaint from any recipient of any of Mr. Revo's letters stating that the letters were false

or misleading, were unfairly coercive, or caused them to enter an attorney-client relationship unwillingly or without adequate information. Aplt. App. at 375-76.

The Board contends that direct mail solicitation letters such as those sent by Mr. Revo are inherently misleading, and therefore may be freely restricted. The Board suggests that direct mail letters to personal injury victims inevitably convey a false message that soliciting lawyers are more experienced, tougher, more skillful, and better qualified than non-soliciting lawyers, notwithstanding the fact that the letters themselves make no reference to those attributes. According to the Board, therefore, the mere sending of any letter to poor and uneducated accident victims (the group the Board claims is specifically targeted by soliciting attorneys) carries with it the notion that the lawyer is superbly able to represent their interests – a notion that is inherently misleading because only unqualified shysters send these letters and because their targeted clients are not sophisticated enough to know that they are being preyed upon. The Board ignores the fact that the letters are sent to all accident victims, without regard to their financial well-being. The fact that different segments of the population may choose different means of selecting lawyers is not proof that those persons choosing lawyers from direct mail solicitation are somehow less capable of making intelligent decisions.

In support of its arguments, the Board points to four soliciting attorneys who it claims are either unqualified to represent personal injury clients or who do not act in the best interests of such clients. According to the Board, these attorneys represent, for all practical purposes, the total population of soliciting personal injury attorneys in

New Mexico. Assuming the Board is correct in its characterizations, the fact that these four attorneys may mislead their potential clients is not proof that the letters themselves are inherently misleading. For a particular mode of communication to be inherently misleading, it must be incapable of being presented in a way that is not deceptive. *In re R.M.J.*, 455 U.S. 191, 203 (1982). The Board offers no proof that some other qualified lawyer who could superbly represent personal injury victims would nevertheless be misleading potential clients simply by sending a direct mail solicitation. In addition, the Board offers no evidence that anyone was actually deceived by Mr. Revo's letters. Given the absence of any evidence of actual deception, the Board's "concern about the possibility of deception in hypothetical cases is not sufficient to rebut the constitutional presumption favoring disclosure over concealment." *Peel v. Attorney Disciplinary Comm'n of Ill.*, 496 U.S. 91, 111 (1990); *Ibanez v. Florida Dep't of Bus. & Prof. Regulation*, 114 S. Ct. 2084, 2090 (1994).

Having determined that the solicitation letters in question are protected commercial speech, we now turn to the first element of the *Central Hudson* test. " 'Unlike rational basis review, the *Central Hudson* standard does not permit us to supplant the precise interests put forward by the State with other suppositions.' " *Went For It*, 115 S. Ct. at 2376 (quoting *Edenfield v. Fane*, 507 U.S. 761, 768 (1993)). The Board asserts that it has a substantial interest in maintaining the public's respect for the legal system – respect which may be eroded by personal injury solicitation letters. The Supreme Court found this interest substantial in *Went For It*. 115 S. Ct. at 2376. The Board

also has a substantial interest in protecting the privacy of accident victims. *Id.; Edenfield,* 507 U.S. at 769. *But see Shapero v. Kentucky Bar Assoc.,* 486 U.S. 466, 475-76 (1988).

The heart of the *Central Hudson* test as it applies to New Mexico's ban is in the remaining two elements, which can be characterized as the "fit" between the ban and the interests it is designed to serve. The second element asks whether the ban directly and materially advances the asserted state interest. In *Central Hudson,* the Court explained this inquiry by stating that "the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose." 447 U.S. at 564. The Board's burden "is not satisfied by mere speculation and conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Went For It,* 115 S. Ct. at 2377 (citations omitted).

According to the Board, direct mail solicitation by personal injury lawyers "engenders the public perception of ambulance chasing, which has been shown to encourage overreaching and underrepresentation, and which invades the privacy and offends the sensibilities of those most grievously injured." Aplt. Reply Brief at 11. The first part of this argument goes to New Mexico's interest in upholding the integrity of the legal profession. To demonstrate that the harms it recites are real, the Board proffers its "record," consisting primarily of testimony about the bad practices of soliciting attorneys, along with the results of a survey it conducted of potential direct mail

recipients. The Board cites examples of illegal tie-in relationships between soliciting attorneys and chiropractors, in which the attorneys and chiropractors end up receiving inflated fees at the expense of their clients. The Board's record shows examples of gross underrepresentation of clients by some of the soliciting attorneys, including missing filing deadlines and attempting to settle soft-tissue claims while ignoring obvious and much more serious head injuries. We agree with the Board that such harms are real, and we do not doubt that some of the sharp practices associated with solicitation contribute to the denigration of the legal profession. Though it may sometimes appear otherwise, the practice of law remains a profession, not just a ticket to entrepreneurship. In addition, the lack of correlation between solicitation and the quality of legal services may be lost on those most in need of protection.

There is, however, more to the inquiry. Not only must the harms be real, but the ban must also be able to address those harms in a material way. Mr. Revo claims that the overwhelming majority of the harms identified by the Board are the direct result of unethical practices of two New Mexico attorneys who have unethical referral relationships with two New Mexico chiropractors, and about whom the Board had already received numerous complaints prior to enacting its ban. One of these attorneys receives only five percent of his clients through direct mail solicitation, and the other receives only twenty-five percent of his clients through direct mail. Appellee's Brief at 14, 15 (citing Tr. at 226-27, 289). Thus, a blanket ban on all direct mail solicitation by personal injury lawyers in New Mexico will not protect the other

seventy-five to ninety-five percent of the clients harmed by these two lawyers. Nor will it protect the infinitely greater number of clients who are served by other lawyers who might someday participate in direct mail solicitation, even accepting the Board's mighty assumption that all attorneys who advertise by direct mail are by definition incompetent to represent their clients, regardless of whether the clients were obtained by such solicitation. The ban, therefore, "provides only ineffective or remote support for the [Board's] purpose" of protecting the integrity of the bar by eliminating these bad practices. *Central Hudson*, 447 U.S. at 564.

Regarding its asserted interest in protecting the privacy of direct mail recipients, the Board's record also identifies the real harm suffered by accident victims who receive solicitation letters right after suffering an injury or the loss of a loved one. The Court in *Went For It* distinguished a long line of precedent and held that the receipt of offensive printed material, even though not misleading, could constitute a constitutionally impermissible privacy invasion. 115 S. Ct. at 2378-79 (distinguishing *Shapero*, 486 U.S. at 476; *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 72 (1983); and *Cohen v. California*, 403 U.S. 15, 21 (1971)). The Court pointed out that with its thirty-day restriction on direct mail solicitation to accident victims, Florida was protecting the "privacy and tranquility" of its citizens "while wounds are still open," and "forestall[ing] the outrage and irritation with the state-licensed legal profession that the practice of direct solicitation only days after the accident has engendered." *Went For It*, 115 S. Ct. at 2379. In so holding, the Court emphasized the importance of Florida's anecdotal record

which detailed the harms suffered by accident victims who received solicitation letters so soon after suffering their injuries. *Id.* at 2377-78.

In this case, New Mexico argues that because it has developed a similar record, its restriction on direct mail solicitation must also be upheld. In so arguing, however, the Board has condensed the application of the final two elements of the *Central Hudson* test into one. Not only must the harms asserted by the state be real and capable of redress by the state's chosen regulation, but also the regulation must be no broader than necessary to serve the state's interest. *Central Hudson*, 447 U.S. at 565. This final element of the test is New Mexico's undoing.

New Mexico's ban does directly and materially advance its asserted interest in protecting the privacy of accident victims – it eliminates the receipt of these letters altogether. We are unable to conclude, however, that New Mexico's chosen restriction is sufficiently narrowly tailored to withstand constitutional scrutiny.

In upholding the "fit" of Florida's thirty-day ban, the Court pointed out that the respondents' challenge that the ban was too broad "would have force if the Bar's rule were not *limited to a brief period* and if there were not many other ways for injured Floridians to learn about the availability of legal representation *during that time.*" 115 S. Ct. at 2380 (emphasis added). In concluding that the thirty-day ban was constitutional, the Court said "[t]he palliative devised by the Bar to address these harms is narrow both in scope *and in duration.*" *Id.* at 2381 (emphasis added). The Court distinguished Florida's restriction from the one struck down in *Shapero*, which

was a "broad ban on *all* direct mail solicitations, whatever the time frame and whoever the recipient." *Id.* 2378 (emphasis in original). The New Mexico ban is a complete ban on all personal injury direct mail solicitation, no matter what the time frame, and as such is as broad in scope and duration as it can possibly be.

The Board argues that "New Mexico's ban is proportional in that it effects only four lawyers." Aplt. Reply Brief at 11. According to the Board, therefore, the ban merely "prohibit[s] the advertising activities of this marginal group of attorneys . . . " *Id.* Mr. Revo contends that the ban affects at least eight New Mexico personal injury attorneys who were using direct mail solicitation at the time it was enacted. In fact, it affects every New Mexico attorney who might ever decide to expand his practice to include personal injury clients or who might decide that direct mail is a good way to reach such clients, without any showing that such attorneys have engaged in or are necessarily even likely to engage in the unethical practices identified by the Board. "[M]erely because targeted, direct-mail solicitation presents lawyers with opportunities for isolated abuses or mistakes does not justify a total ban on that mode of protected commercial speech." *Shapero,* 486 U.S. at 476 (citing *In re R.M.J.,* 455 U.S. at 203).

There are several less-burdensome alternatives available to the Board – alternatives which the Board has not shown would be insufficient to materially address its concerns. While it is true that the "least restrictive means test has no role in the commercial speech context," *Went For It,* 115 S. Ct. at 2380, "the existence of 'numerous and obvious less-burdensome alternatives to the restriction on

commercial speech . . . is certainly a relevant consideration in determining whether the "fit" between ends and means is reasonable.' " *Id.* (quoting *Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1510 n.13 (1993)). The Board has not shown why subjecting personal injury direct mail letters to a screening process would not protect against misleading potential clients. All other attorney direct mail solicitation letters are subjected to this screening process, so there can be no argument that such a requirement would be a regulatory burden, particularly in light of the Board's claim that only four attorneys even use such letters. Also, if, as Mr. Revo claims, the real harms identified by the Board are the result of the unethical practices of a handful of attorneys, the existing regulations (or enhanced enforcement of those regulations) for disciplining attorneys for violations of the Rules of Professional Conduct should adequately address those harms. Finally, the Board has not shown why a thirty-day ban similar to Florida's would not adequately address the harms it has identified.

The Board argues that the harms it has identified are without time limits, and that grieving does not fit into a neat thirty-day cycle. This may be true, but the Constitution favors disclosure of information, even in the commercial speech context. The Board has shown that it has significant interests in protecting the emotional well-being of members of the public and in assuring that individuals responding to direct-mail solicitations will be represented by competent attorneys. The Board has failed, however, to demonstrate that its interests outweigh the public's right to at some point receive truthful and non-misleading written advertising that is plainly

and conspicuously marked "Advertising Material" or "Lawyer Advertising."

As applied to Mr. Revo and the letter he proposes to send to personal injury victims, New Mexico Supreme Court Rule 16-701(C)(4) is an unconstitutional violation of the First Amendment. New Mexico's complete ban on attorney direct mail solicitation to personal injury victims is not narrowly tailored to serve the Board's interests, and is therefore unenforceable. *See Board of Trustees, State Univ. of N.Y. v. Fox*, 492 U.S. 469, 483 (1988) (although as applied holding on commercial speech restriction does not assure a defense to all others whose own commercial solicitation may be constitutionally proscribed, rationale of narrow-tailoring holding may be so broad as to render statute effectively unenforceable).

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

TERRENCE REVO,

Plaintiff,

vs.

DISCIPLINARY BOARD OF THE SUPREME COURT FOR THE STATE OF NEW MEXICO, et al.,

Defendants.

No. CIV 92-764 JB/JC/WWD

(Filed Nov. 28, 1995)

ENTERED ON DOCKET

MEMORANDUM OPINION, FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS MATTER was tried before the Honorable Juan G. Burciaga, Chief Judge of the District of New Mexico, from December 7, 1992 through December 10, 1992. Chief Judge Burciaga did not rule on this case prior to his untimely death on March 5, 1995. The case was then transferred to me. I met with the attorneys and gave them the option of a new trial or that I would review the transcripts and depositions. The parties opted for the latter. I have now read the 983 pages of trial transcript and approximately 23 depositions. The parties have filed amended requested findings of fact and conclusions of law. I have not taken any live testimony.

Both parties have indicated to me that they simply want a decision so that the matter may be appealed to the Tenth Circuit Court of Appeals. Both parties have indicated that whoever loses will appeal. This case presents a unique situation in that the appellate court is free to make its own findings of fact and disregard mine, as they are in

the same position as I have been – to review a cold transcript. In light of the recent pronouncement by the United States Supreme Court in *Florida Bar v. Went for it, Inc.*, 115 S. Ct. 2371 (1995), an appeal by the defendants may be of little value. Both sides at my request have briefed *Florida Bar.* I have met with all of the attorneys and given them my oral ruling in this case in the hope that amicable settlement could be reached; however, the defendants have indicated they still wish to appeal. A brief history would be beneficial before I actually set forth my findings of fact and conclusions of law.

Plaintiff is one of a handful of attorneys in Albuquerque who solicits personal injury cases by direct mail. The solicitation is initiated by obtaining copies of automobile accident reports from the Albuquerque Police Department and the New Mexico State Police. These lists are obtained early each morning and a form letter is sent to the accident victim. There were four or five attorneys obtaining these lists, and at least that number of chiropractors. As will later be shown, it was important whether the attorney contacted the victim first or whether the chiropractor was the initial contact.

The attorney would basically have no knowledge of the accident. His staff would simply prepare the letter based on the accident report. Plaintiff did not intentionally send his letters in death cases; however, some survivors did receive letters directed to persons who had been killed in an accident. The attorneys are barred by S.C.R.A. 1986, Rule 16-703 (1995 Repl. Pamp.) from soliciting motor vehicle accident victims by telephone; however, during the period relevant to this case, the chiropractors had no such rule. Evidence showed that the

chiropractors routinely followed up their own solicitation letters with their telemarketing people who would work from 5:00 to 8:00 each evening. Surveys obtained by the defendants show that lower income and less educated individuals are most likely to respond to these letters. With the increase in income and educational levels, the soliciting attorneys are referred to as "ambulance chasers" and other phrases of that ilk.

Let's assume that an accident victim responds to a soliciting attorney and then retains that attorney. Let us also assume that the accident victim has not yet received medical treatment except for possibly paramedic or emergency room treatment. Invariably the soliciting attorney will then refer his now-client to his selected list of chiropractors because the attorney knows the chiropractor will refer a patient to him in return. On the other hand, let us assume the accident victim responds to the chiropractor's letter or follow-up phone call. The victim who then decides to accept the services of the chiropractor invariably is asked by the chiropractor if the victim has obtained an attorney. When the answer is no, then the victim is directed to an attorney who is on the chiropractor's selected list. The chiropractor's list may include attorneys who are not direct mail soliciting attorneys but are simply attorneys who have agreed to work with a chiropractor in accordance with their mutually acceptable terms.

The chiropractor knows from the accident report if there is insurance coverage. The chiropractor knows from his client if he has his own insurance policy. However, let us examine the scenario where the accident victim responds to the chiropractor's solicitation, becomes his

patient and is totally uninsured. The other driver is at fault and has sufficient liability insurance.

The chiropractor will examine the patient, take extensive x-rays, and the patient will probably be seen five days a week for two to three weeks. These visits then drop off to three times a week, two times a week, etc. The patient will again be completely x-rayed after the first two weeks and the x-rays compared with the first set. If there is insurance involved, some chiropractors will also sell the patient a book and a type of balm that was described as not much more than plain water. If you were not an accident victim but simply walked in off the street with a back problem, the chiropractor would tell you to come back when you needed additional manipulation and it would be on a pay-as-you-go basis. However, if you were an accident victim, the chiropractor would refer you to an attorney on his preferred list who would protect the chiropractor's bill. To protect the chiropractor's bill simply means that the attorney will assure payment of the chiropractor's entire bill in full from the settlement proceeds.

There was testimony that the average settlement was in the neighborhood of $12,000, so I will use that figure to divide up the settlement between the chiropractor, attorney and accident victim. First of all, both the attorney and the insurance adjuster know that the chiropractor's bill is inflated. The insurance adjuster discounts the claim because of the inflated chiropractic charges. The only person who doesn't know that the bill is inflated is the accident victim. In this case let us suppose the chiropractic bill would be reasonable at $2,000 but in fact is $4,000.

The chiropractor receives his protected $4,000, the attorney takes one third, $4,000, and the victim receives the balance, $4,000. The problem, obviously, is the victim should have received $6,000, the attorney $4,000, and the chiropractor $2,000.

This screnario [sic] immediately brings to mind the attorney's responsibility to vigorously advocate the position of his client under a duty of loyalty. To assure such loyalty, the lawyer must avoid conflicts of interest which "will materially interfere with the lawyer's independent professional judgment." A.B.A. Commentary to S.C.R.A. 1986, Rule 16-107. Moreover, S.C.R.A. 1986, Rule 16-504C requires that an attorney shall not permit a third party recommending the attorney's services "to direct or regulate the lawyer's professional judgment in rendering such legal services." This independent loyalty to the client appears to be compromised when the chiropractor is "protected."

The soliciting attorneys in general have virtually no trial experience. Mr. Revo probably has the most trial experience, but even his is quite limited. Over the four years covered by his testimony, he has settled approximately 450 cases at an average of $12,000 each. However, limited trial experience is not a First Amendment problem when plaintiff's solicitation letter is not misleading. I will now enter my findings of fact and conclusions of law so the defendants can move on with their appeal.

FINDINGS OF FACT

1. Each of the individual parties is a resident of the State of New Mexico.

2. Plaintiff is an attorney licensed in New Mexico who sent letters to individuals who receive personal injuries in automobile accidents.

3. The Disciplinary Board is an agency of the Supreme Court of New Mexico and is responsible for the supervision of disciplinary proceedings affecting members of the New Mexico State Bar, pursuant to the New Mexico Supreme Court Rules Governing Discipline, S.C.R.A. 1986, Sections 17-101 through -316 (1995 Repl. Pamp.).

4. As officials of the State of New Mexico, the members of the Disciplinary Board act under color of state law in investigating, prosecuting and enforcing the Rules of Professional Conduct.

5. The members of the Disciplinary Board are sued only in their official capacities.

6. Rule 16-701(C)(4) of the New Mexico Rules of Professional Conduct, as amended on April 30, 1992 and effective August 1, 1992, provides, in pertinent part, as follows:

> **C. Prohibited Solicitations.** A lawyer may not send or permit to be sent a written communication to a prospective client for the purpose of obtaining professional employment if . . . (4) the written communication or other solicitation . . . concerns an action for personal injury or wrongful death or otherwise relates to an accident

involving the person to whom the communication is addressed or a relative of that person.

7. Since August 1, 1992, the Disciplinary Board has been charged with the responsibility for opening disciplinary proceedings and investigations against all attorneys who choose to advertise their services through mailings to accident victims.

8. Lawyers who violate the current Rules of Professional Conduct are subject to the full range of available discipline, from admonition to disbarment.

9. Venue properly lies in this district.

10. Mr. Revo has been a member in good standing of the New Mexico and New York bars since 1978 and 1976 respectively.

11. From 1979 to the present, Mr. Revo has been in the private practice of law in Albuquerque. Until 1988 Mr. Revo had a general law practice, including real estate matters and personal injury matters. During the 1980s Mr. Revo advertised in both the "real estate" and "personal injury" sections of the Albuquerque yellow pages.

12. Beginning in 1988, Mr. Revo began concentrating his practice in personal injury cases. In the same year Mr. Revo began advertising his services by means of direct mail letters to persons injured in automobile accidents.

13. The advertising letter which Defendants seek to prohibit Plaintiff from using to advertise his services is as follows:

[Date] "LAWYER ADVERTISEMENT"

[Name and Address]

Dear [Title and Name]:

The Albuquerque Police [State Police] Department records show that you were recently involved in an auto accident. Unfortunately, such accidents are an all too common fact of life and can cause serious concern. I understand that dealing with injuries, emergency rooms, medical bills, lost earnings, damaged autos, rental cars, and insurance adjusters can be difficult and frustrating.

In our system of legal justice, the injured person has certain rights and protections under the law. It is important that you know about your rights before deciding what to do.

I have been an attorney for more than 16 years. I invite you to make an appointment for a free initial consultation and evaluation of your case. We will do our best to answer all your questions and you are under no obligation to hire my firm.

I accept personal injury cases on a contingency fee basis, which means that my fee is based upon a percentage of your total recovery, before costs are deducted. Regardless of the outcome, the client will bear the expenses of the case. Some exceptions may apply. I have found that the earlier I become involved in a case, the more I can do on your behalf, therefore, I invite you to call today.

If you have already retained the services of an attorney, I hope that your case will proceed well and that you have a positive outcome. If you are not represented, then I ask you to think about

what is at stake, now and for the future. If we can help please call.

Respectfully,

M. Terrence Revo

14. The letter which Mr. Revo seeks to send to automobile accident victims provides useful information to the public concerning their legal rights, including:

a. that automobile accident victims have certain legal rights arising from the negligence of a third party or the liability of an insurance company;

b. that there are attorneys who will see automobile accident victims for a consultation without charge;

c. that there are attorneys who will represent automobile accident victims for a contingent fee;

d. that an attorney can usually do more for a client the sooner he or she gets involved in the case; and

e. the name, address, and telephone number of a specific attorney whom the recipient may call without charge.

15. Direct mail advertising of the kind Mr. Revo seeks to employ provides information to persons who most need the legal services of an attorney because:

a. Persons involved in automobile accidents as a general rule do not have a good understanding of their rights under an insurance policy and a good portion of the public would not understand paragraphs in an insurance policy.

b. Accident victims often do no [sic] have a good understanding of underinsured and uninsured motorist coverage, of the law allowing stacking of insurance policies, or of the limitations periods that may affect their ability to bring claims.

c. Insurance companies attempt to contact potential claimants as soon as possible after an accident, knowing that attorneys will not usually allow their clients to give the insurer a recorded statement.

d. Depending on the nature of a case, people injured in an automobile accident may need representation by an attorney.

e. Many people, being injured in an automobile accident, would need the name of an attorney and would find the information in Mr. Revo's letter to be helpful.

16. According to a leading expert on lawyer ethics, and the Reporter for the Model Rules of Professional Conduct, Professor Geoffrey Hazard, Jr., New Mexico's ban on direct mail advertising has its most adverse effect on people who do not have prior acquaintance with a lawyer or prior experience in seeking out legal services. The ban therefore cuts off an information flow to people who are most in need of information about legal services.

17. The people served by direct mail advertising are the portion of the populace who do not frequently come into contact with attorneys and who may not know how to contact one.

18. The people who benefit by receiving direct mail will lose a source of information if the ban remains in effect.

19. Despite the presence of other forms of attorney advertising, the use of direct mail advertising contributes additional information about the legal marketplace, thus allowing consumers to be better informed and have greater access to that marketplace.

20. The letter at issue in this case, see Paragraph 13, *infra,* is neither false nor misleading in that:

a. the letter makes no claims about Mr. Revo's level of experience, except for the claim that he has been a lawyer for more than 16 years, which claim is absolutely true;

b. the letter makes no representation that Mr. Revo has special information about the recipient and is careful to identify for the recipient the source of information about the recipient;

c. the letter makes no promises or representations about the nature of Mr. Revo's practice or that he has any special qualifications to represent the recipient other than those required to practice law; thus, the Lawyer Advertising Committee established to review lawyer advertisements would not consider Mr. Revo's letter one that makes improper claims; and

d. the letter creates no undue sense of "urgency" and merely invites the recipient to call the lawyer after reading the letter.

21. The letter at issue is not inherently misleading because it is not reasonably susceptible to any inference that Mr. Revo is more or less qualified than any other lawyer with 16 or more years of experience who handles personal injury claims or to any inference that Mr. Revo's

caseload is greater or smaller than that of other personal injury practitioners.

22. No recipient of any letter sent by Mr. Revo has ever complained to the Disciplinary Board or its counsel that Mr. Revo's letters contained false or misleading statements, that it caused the recipient to enter an attorney-client relationship unwillingly or without adequate information, or that Mr. Revo's letters were unfairly coercive or took unfair advantage of the vulnerabilities of the recipient.

23. At the time that New Mexico banned attorneys from sending direct mail advertising to personal injury victims, New Mexico adopted a procedure for screening lawyer advertisements.

24. The screening procedure applies by its terms to all lawyer direct mail advertisements, such as those sent in criminal cases, children's court cases, domestic violence cases, foreclosures, divorce or other areas of the law. The screening procedure does not apply to personal injury letters because such letters are, by a special rule, banned. S.C.R.A. 1986, Rule 16-701(C)(4)(1995 Repl. Pamp.).

25. New Mexico's Rules of Professional Conduct give the Disciplinary Board the power and obligation to discipline attorneys who send advertisements that are false or misleading, including those which create unjustified expectations or which make a material misrepresentation of fact or law. S.C.R.A. 1986, Rules 16-701 and 17-102 (1995 Repl. Pamp.).

26. The defendants have presented no evidence that the existing screening procedure, if applied to direct mail personal injury letters, would prove inadequate to regulate the content of letters to assure that they remain truthful and nonmisleading. The evidence provided by Ms. Ferrara and Mr. Spring provides, to the contrary, that such procedures would be effective.

27. The State Supreme Court when it adopted the ban on advertising was concerned that people responding to direct mail were not being represented by lawyers with as much competence as other lawyers.

28. A properly staffed specialist in personal injury law, with a trained staff, is able to handle a significantly higher number of cases than a nonspecialist without adequate procedures and staff support.

29. The Defendants have failed to show that the State cannot address alleged concerns about high attorney caseloads by means of less intrusive restrictions on protected speech.

30. The State of New Mexico has adequate means, through the existing Rules of Professional Conduct, to address any concern that a lawyer or group of lawyers is abusing clients.

31. In New Mexico, the Disciplinary Board has the duty and the power to investigate the conduct of any attorney and to initiate an investigation on its own motion or to undertake an investigation on the complaint of any person.

32. Before the advertising ban went into effect, the Board had the power to punish many forms of attorney misconduct, including the following:

a. claims of specialization in fields of law other than those as specifically permitted by the Specialization Rules, S.C.R.A. 16-701(A)(5);

b. the failure to provide competent representation to a client, S.C.R.A. 16-101;

c. the failure of a lawyer to act with reasonable diligence and promptness in representing a client, S.C.R.A. 16-103;

d. the failure to keep a client reasonably informed about the status of a matter and to comply with reasonable requests for information, S.C.R.A. 16-104;

e. the charging of an excessive fee, S.C.R.A. 16-105;

f. the acceptance of representation where there is a prohibited conflict of interest, S.C.R.A. 16-107;

g. direct telephone solicitation of clients where the lawyer has no family or prior personal, business or professional relationship with the potential client, S.C.R.A. 16-703;

h. conduct involving dishonesty, fraud, deceit, or misrepresentation, S.C.R.A. 16-804(C);

i. conduct that is prejudicial to the administration of justice, S.C.R.A. 16-804(D); and

j. conduct that adversely reflects on the attorney's fitness to practice law, S.C.R.A. 16-804(H).

33. Since January 1, 1988, the Disciplinary Board has never instituted formal charges against any New Mexico attorney for an alleged violation of the Rules of Professional Conduct governing attorney advertising, solicitation or attorney communications.

34. If the Disciplinary Board is genuinely concerned that Mr. Revo abuses clients or conducts his practice in an unethical or improper fashion, it has adequate means of addressing those concerns without an absolute ban on a particular form of commercial speech.

35. The Disciplinary Board has the authority under its existing rules to discipline any lawyer who has an improper referral relationship with any physician.

36. The Defendants have failed to identify a single personal injury victim or family members of a decedent who, as a result of direct mail advertising, was unable to make a rational and informed decision concerning the hiring of a lawyer.

37. Neither the New Mexico's Chief Disciplinary Counsel nor the members of the New Mexico Supreme Court are aware of any person being coerced to hire an attorney because of a direct mail letter.

38. New Mexico has the means, without a complete ban on direct mail advertising, to protect the recipients of direct mail advertising from undue intrusion:

a. New Mexico's lawyer discipline rules prohibit lawyers from soliciting individuals whom the lawyer has reason to know to be unable to exercise reasonable judgment in selecting a lawyer because of that person's physical, emotional, or mental state;

b. Lawyers sending direct mail are required to label the envelope of direct mail letters with the words "LAWYER ADVERTISEMENT;"

c. Cooling-off periods or waiting periods in which direct solicitation is not permitted will measurably reduce the dangers posed by direct solicitation for a substantial segment of the accident victims. New Mexico could adopt a waiting period during which lawyers are prohibited from sending advertising to, or contacting, victims of personal injury and the family members of those deceased.

CONCLUSIONS OF LAW

1. The letter at issue in Mr. Revo's Second Amended Complaint is truthful, nonmisleading, and concerns lawful activity.

2. The State has shown that it has significant interest in protecting the emotional well-being of members of the public and in assuring that individuals responding to direct mail solicitations will be represented by competent attorneys. However, the State has failed to demonstrate that its interests outweigh the public's right to at some point receive truthful and non-misleading written advertising that is plainly and conspicuously marked "ADVERTISING MATERIAL" or "LAWYER ADVERTISING."

3. The advertising ban adopted by the State minimally advances the asserted State interests of:

a. preventing alleged abuses conducted by some attorneys who have employed direct mail advertising;

b. reducing the potential for undue influence and overreaching in the process of lawyer selection;

c. avoiding the emotional harm to the relatives of death victims that allegedly occurs after the receipt of direct mail advertising; and

d. enhancing the public's image of the legal profession or of "extinguishing the adverse impact on the administration of justice."

4. The State has not shown that the ban on attorney direct mail is no more broad than reasonably necessary. To address the State's proffered concerns for abuse, more narrowly tailored alternatives are available to the State, the following of which have not been shown would be ineffective:

a. stricter enforcement of existing disciplinary rules to deter or punish attorneys who have allegedly entered into "tying" arrangements with chiropractors for the referral of clients;

b. stricter enforcement of existing disciplinary rules to deter or punish attorneys who have allegedly neglected client cases as a result of high-volume caseloads; or

c. the adoption of a waiting period on the mailing of letters to accident victims in advancing any State's interest in preventing "direct emotional injury" to those who receive the letters following an accident or the death of family members and as a means of addressing a concern over the public image of lawyers.

5. The advertising ban adopted by the New Mexico Supreme Court minimally advances the asserted state interests.

6. The ban on direct mail advertising to accident victims violates the Plaintiff's constitutional right to equal protection in that the State has failed to demonstrate a sufficiently substantial state interest in discriminating between the plaintiff's use of direct mail to advertise to accident victims and its use by other attorneys to reach the same prospective client audience who are not the victims of an accident.

7. Rule of Professional Conduct 16-701(C)(4) is unconstitutional as applied to the Plaintiff and the letter he seeks to send to automobile accident victims.

8. The Plaintiff has no adequate remedy at law for violation of his rights.

9. The Plaintiff faces permanent and irreparable harm if the enforcement of Rule 16-701(C)(4) is not enjoined.

An injunction will issue enjoining the Defendants from enforcing Rule 16-701(C)(4) against the Plaintiff's use of the letter described in the Second Amended Complaint.

The Plaintiff is entitled to recovery of his costs.

An Order in accordance with this Memorandum Opinion will be entered.

DATED November 28, 1995.

/s/ John E. Conway
CHIEF UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

TERRENCE REVO,

Plaintiff,

vs.

DISCIPLINARY BOARD OF THE SUPREME COURT FOR THE STATE OF NEW MEXICO, et al.,

Defendants.

No. CIV 92-764 JB/JC/WWD

ENTERED ON DOCKET

(Filed Nov. 28, 1995)

ORDER, JUDGMENT AND DECREE OF PERMANENT INJUNCTION

Pursuant to the findings and conclusions set forth in the Memorandum Opinion accompanying this Order and entered this date, and the Court being fully advised in the premises,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that New Mexico's absolute ban on direct mail advertising by attorneys to accident victims as set forth in S.C.R.A. 1986, Rule 16-701(C)(4) is **declared to be unconstitutional as applied to Plaintiff and the solicitation letter he seeks to use.**

IT IS FURTHER ORDERED that the **defendants are permanently enjoined from enforcing Rule 16-701(C)(4) against the Plaintiff's use of the letter described in the Second Amended Complaint.**

IT IS FURTHER ORDERED that final judgment is hereby entered for Plaintiff, and he shall recover his costs of this action.

DATED November 28, 1995.

/s/ John E. Conway
CHIEF UNITED STATES DISTRICT JUDGE

Research & Polling, Inc.

(LOGO)

Community Attitude Survey
Public Perception of Direct Mail Advertising
By Attorneys

December 1992

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Methodology

This public opinion poll was commissioned by the State Disciplinary Board in order to measure public attitudes and perceptions of direct mail advertising by attorneys.

The Interview

The interviews were conducted on a personal, face-to-face basis. Field interviewers conducted the surveys in various locations throughout the community. The locations where the field interviews took place were as follows:

Academy Station Post Office (San Antonio Drive, NE)
Arts and Crafts Show – State Fair Grounds
Flea Market – State Fair Grounds
Furr's Cafeteria (San Pedro and Central)
Indoor Mercado (12th Street at I-40)
Jewel Osco (Montgomery and San Mateo)
Jewel Osco (Lomas and Juan Tabo)
K-Mart (Central and Atrisco)
Mission Square Laundromat (1331 Juan Tabo Blvd., NE)
Osco Drug (Academy and Wyoming)
Public Library on Wyoming
Palo Duro Senior Center (5221 Palo Duro Avenue, NE)
Princess Jeanne Shopping Mall (Eubank and Constitution)
Smiths Market (Tramway and Montgomery)
Target (Lomas and Eubank)
Thrift Town (Zuni and San Mateo)
Walgreens (University and Central)
University Shopping Center (Girard and

Central)
Walmart (Montgomery and Wyoming)

The respondents were shown a letter and asked to read it. A copy of this letter is included within the appendix of this report. Interviews were conducted between November 27th and December 1st of 1992.

The field inverviewers are professionals who are brought together for a training session prior to each survey. This ensures their complete understanding of the survey instrument.

Sample

A total of 563 adults residing in the Albuquerque Metropolitan area were interviewed. The initial line of questioning screened out people who would not be eligible for jury duty. Thus, all respondents had to either have a valid New Mexico drivers' license or be registered to vote in New Mexico. Also, people who were either directly or who had family members employed in the legal professions (lawyer, judge, clerk, etc.) or the advertising or media industries (newspapers, television, radio, etc.) were not interviewed.

Sample Bias

In any survey, there are some respondents who will refuse to speak to the professional interviewer. A lower response rate among certain types of respondents can result in a sample wherein certain types of people are over-represented or under-represented. The potential for sampling bias increases as the response rate decreases.

Research & Polling often set quotas for various segments of the population which are historically under-counted. This has the effect of minimizing but not necessarily eliminating sampling bias.

Since submittal of the original data, Research & Polling reviewed whether the sample was representative of the community. Upon reexamination of this issue, we confirmed that gender, ethnicity, age and income were generally representative of the adult population. The only demographic subgroup which was not entirely representative of the general population was level of education. At the request of the client, the data were weighted by educational level to more accurately reflect general population characteristics. A comparison between the weighted and unweighted data, however, indicate no significant differences in the survey results. This study often reports both unweighted and weighted data.

Neither the Project Manager nor the field interviewers were aware of the name of the client.

Margin of Error

A sample size of 563 at a 95% confidence level provides a maximum margin of error of approximately plus or minus 4%. In theory, in 95 out of 100 cases, the results based on a sample of 563 will differ by no more than approximately 4 percentage points in either direction from what would have been obtained by interviewing all adults in the target area.

The Questionnaire

The questionnaire is pre-tested to ensure the questions are clear and easily understood. We also pre-tested to ensure the accuracy of the questionnaire.

Overall Reaction to Letter

Question 1: Let's say that you were in an automobile accident last week and you received this letter today. Would your overall reaction to receiving this letter be positive or negative?

	Positive	*Negative*	*Neutral*	*Depends on Circumstances*	*Don't Know/ Won't Say*
Unweighted Responses *(N = 563)*	32%	58%	7%	1%	1%
Weighted Responses	36%	56%	6%	1%	1%
Have Received Unsolicited Letters From Lawyers					
Yes	20%	74%	4%	–	1%
No	41%	45%	10%	1%	2%
Educational Level					
Less than high school	50%	50%	–	–	–
High school graduate	50%	42%	5%	1%	2%
Vocational certificate	51%	40%	9%	–	–
Some college/ associate degree	25%	67%	6%	1%	1%
College graduate	23%	68%	7%	3%	–
Graduate work or degree	19%	64%	15%	1%	1%
Household Income					
Less than $10,000	53%	41%	4%	–	1%
$10,000 to $19,999	44%	45%	7%	3%	1%
$20,000 to $29,999	25%	64%	10%	1%	–
$30,000 to $39,999	30%	63%	4%	–	3%
$40,000 and over	18%	70%	10%	2%	1%
Ethnicity					
Anglo	23%	67%	9%	1%	1%
Hispanic	47%	44%	5%	2%	2%
Other	40%	56%	2%	–	2%

Thirty-two percent of Albuquerque area adults have a positive reaction to the Revo letter which was shown to all respondents.

Fifty-eight percent of Albuquerque adults have a negative reaction to the letter.

Among adults who have personally received similar letters from attorneys, 20% have a positive reaction and 74% have a negative reaction.

Adults with lower education and income levels are much more likely to have a positive reaction to the letter. Specifically, 50% of those with a high school education or less have a positive reaction as compared to 19% with a post college education. Similar trends occur among low and high household income levels.

Reasons Underlying Positive/Negative Reaction to Letter

Question 2: Why do you feel that way?

Among Those With Positive/Negative Reaction to Letter (N = 510)

	Positive Responses[1]
Provides a lot of helpful information	19%
I would need the name of a lawyer	16%
Well written/good letter	4%
Aggressive attorney/good lawyer	3%
No/little expense/work is contingent	2%
Makes it clear it is an advertisement	1%
Looks like an experienced lawyer	1%
Shows concern	1%

[1] *All responses of 1% or greater are reported in the above table.*

Negative Responses[2]	
Unprofessional/ambulance chasers	32%
Privacy/how did they know	21%
Encourages people to sue others	11%
Makes lawyers/legal system look bad	6%
Poor lawyers/trying to get more work	6%
Makes me mad/insulted	6%
I would rather find my own lawyer	4%
Don't want to remember/resent the bother	4%
Drives up cost of insurance	2%
Need to accept responsibility for actions	1%
Very impersonal	1%
Don't know/won't say	1%

Among adults who expressed an opinion regarding the letter, 32% have a negative reaction because they consider the letter to be unprofessional. Over 20% feel the letter is an invasion of their privacy; 11% believe that these letters encourage people to sue other people. Six percent of the adults feel these letters make the entire legal system look bad.

Among people with an opinion regarding the letter, 19% have a positive reaction because they feel the letter provides a lot of helpful information. Sixteen percent say they would need the name of a lawyer anyway.

Direct Mail Solicitation of Persons Injured in Collision With Respondent

Question 3: If you were involved in a car wreck and a person in the car you collided with was injured, would

---

[2] *All responses of 1% or greater are reported in the above table.*

you want that injured person to receive this type of letter from a lawyer?

	YES	NO	DON'T KNOW/ WON'T SAY
Unweighted Sample (N = 536)	36%	54%	10%
Educational Level			
Less than high school	65%	35%	–
High school graduate	48%	47%	5%
Vocational certificate	57%	29%	14%
Some college/ associate degree	28%	61%	11%
College graduate	26%	62%	13%
Graduate work or degree	28%	54%	17%
Household Income			
Less than $10,000	63%	33%	3%
$10,000 to $19,999	49%	45%	6%
$20,000 to $29,999	29%	59%	12%
$30,000 to $39,999	25%	58%	18%
$40,000 and over	24%	62%	15%
Ethnicity			
Anglo	28%	61%	11%
Hispanic	50%	43%	7%
Other	44%	38%	17%

Fifty-four percent of the adult respondents would not want this type of letter to be sent to an injured person.

Albuquerque adults with lower educational levels and lower household incomes are more likely to want this letter sent to an injured party with whom they were involved in an automobile accident.

Perceived Impact of Letter on Jurors

Question 4: Let's say a lawyer sent a letter to an accident victim, asking the accident victim to call that lawyer about handling his or her lawsuit. Let's also say that as a result to the letter, the accident victim hired that lawyer. What if, during the trial, the jurors were told that the accident victim had hired the lawyer in this manner. Do you think this would cause the jurors to award less money to the accident victim or not?

	Yes, Less Money	*No, Not Less Money*	*Depends*	*Don't Know/ Won't Say*
Unweighted Responses (N = 563)	32%	53%	4%	10%
Weighted Responses	32%	55%	4%	9%
Have Received Unsolicited Letters from Lawyers				
Yes	47%	43%	–	10%
No	27%	54%	7%	12%

Adults were asked whether they felt jurors would award less money to an accident victim who had hired a lawyer through a direct mail solicitation. (Please see the top of the page for the exact language of the question.) Nearly one-third of the adults think that a jury would award less money to an accident victim, if the jurors were told in the course of the trial that the plaintiff had hired his or her attorney as a result of receiving a direct mail solicitation.

Fifty-three percent of the adults do not feel that the jurors would award less money.

Among adults who have personally received similar letters at home, 47% feel a jury would award less money if the jury knew the plaintiff had hired a lawyer through direct mail solicitation.

Public Perception of Lawyers Who Write Letters to Accident Victims

Question 5: Generally, do you think lawyers who write letters to accident victims usually have less experience, the same experience or more experience in trying car accident cases than lawyers who do not write letters to accident victims?

Experience in Trying Car Accident Cases

	More Experience	Same Experience	Less Experience	Don't Know/ Won't Say
Unweighted Responses (N = 563)	26%	29%	36%	9%
Weighted Responses	28%	29%	34%	8%

Question 6: Generally, do you think lawyers who write letters to victims of car accidents are less tough, the same, or more tough in their dealings with insurance companies than lawyers who don't write letters to the accident victims?

Toughness in Dealings With Insurance Companies

	More Tough	Same	Less Tough	Don't Know/ Won't Say
Unweighted Responses (N = 563)	40%	34%	15%	12%
Weighted Responses	42%	31%	16%	11%

Question 7: Generally, do you think lawyers who write letters to victims of car accidents are less skillful, the same or more skillful in obtaining results for their clients in car accidents than lawyers who don't write these letters?

Skillfulness in Obtaining Results for Their Clients

	More Skillful	Same	Less Skillful	Don't Know/ Won't Say
Unweighted Responses (N = 563)	21%	40%	30%	9%
Weighted Responses	26%	37%	30%	7%

NOTE: Words are bolded for ease of reading. Words were not bolded on the original questionaire.

Question 8: Generally, do you think lawyers who write letters to accident victims involved in car accidents are worse lawyers, the same quality or better lawyers than those who do not write these letters?

Quality of Lawyer

	Better Quality	Same Quality	Worse Quality	Don't Know/ Won't Say
Unweighted Responses (N = 563)	10%	41%	41%	8%
Weighted Responses	15%	40%	39%	6%

Question 9: Generally, do you think you will get a worse deal, same deal or better deal with a lawyer who writes letters to accident victims in car accident cases than with a lawyer who does not write letters to accident victims?

Type of Financial Deal

	Better Deal	Same Deal	Worse Deal	Don't Know/ Won't Say
Unweighted Responses (N = 563)	21%	34%	34%	12%
Weighted Responses	24%	33%	31%	11%

Question 10: Generally, do you think lawyers who write letters to victims of car accidents are less dedicated, the same or more dedicated to the interests of accident victims than lawyers who don't write these letters?

Level of Dedication to Interests of Accident Victims

	More Dedication	Same Dedication	Less Dedication	Don't Know/ Won't Say
Unweighted Responses (N = 563)	23%	36%	38%	4%
Weighted Responses	27%	35%	35%	4%

Segmentation of Results by Demographic Groups

Educational level: Albuquerque adults who have a lower educational level are significantly more likely than higher educated individuals to perceive attorneys who send these letters to be:

- more experienced;
- more skillful;
- of better quality; and
- inclined to give a better deal.

Ethnicity: Hispanics are signficantly more likely than Anglos to perceive attorneys who send direct mail solicitations to be:

- tougher;
- of better quality;
- more dedicated; and
- inclined to give a better deal.

Household income: Albuquerque adults with lower household incomes are significantly more likely than

higher household income individuals to perceive lawyers who send these letters to be:

- more skillful;
- of better quality;
- more dedicated; and
- inclined to give a better deal.

Perceived Regulation of Direct Mail Advertising

Question 11: Do you think the Supreme Court, or whatever agency supervises lawyers, requires that lawyers who send letters to accident victims be experienced in the trial of automobile accident cases?

	YES	NO	DON'T KNOW
Unweighted Responses (N = 536)	54%	38%	8%
Weighted Responses	58%	34%	8%
Education Level			
Less than high school	77%	15%	8%
High school graduate	62%	31%	7%
Vocational certificate	54%	31%	14%
Some college/ associate degree	59%	34%	8%
College graduate	45%	50%	5%
Graduate work or degree	38%	49%	12%
Ethnicity			
Anglo	47%	45%	8%
Hispanic	70%	22%	8%

The majority of Albuquerque adults (54%) think the Supreme Court requires lawyers who send solicitation

letters to accident victims be experienced in such litigation.

As educational level increases, the tendency to think attorneys who send direct solicitation letters are required by the Supreme Court to be experienced in such matters decreases.

Hispanics are much more inclined than Anglos to think the Supreme Court requires lawyers who send solicitation letters to accident victims be experienced in such litigation, 70% and 47%, respectively.

Demographics of Sample

	TOTAL RESPONSES (N = 563) UNWEIGHTED	TOTAL RESPONSES[1] (N = 562) WEIGHTED
Age		
18 to 34 years	40%	39%
35 to 49 years	39%	37%
50 to 64 years	13%	14%
65 years and over	8%	10%
Ethnicity		
Anglo	61%	52%
Hispanic	29%	39%
Other[2]	10%	9%

[1] *This study often reports both weighted and unweighted data. The weighted data adjusts the results to account for a more representative distribution of the general population by educational level.*

[2] *Includes African-American, Native American Indian, Asian and others.*

Gender		
Male	47%	47%
Female	53%	53%
Educational Level		
Less than high school	5%	17%
High school graduate	23%	28%
Vocational certificate	6%	5%
Some college/ associate degree	30%	23%
College graduate	21%	16%
Graduate work or degree	14%	11%
Household Income		
Less than $10,000	16%	22%
$10,000 to $19,999	19%	19%
$20,000 to $29,999	21%	21%
$30,000 to $39,999	17%	16%
$40,000 and over	22%	19%
Won't say	5%	4%
Residence Location		
Valley/Downtown	19%	24%
West side	6%	6%
Mid-Heights	39%	37%
Far Heights	32%	28%
Other	4%	4%

QUESTIONNAIRE

COMMUNITY ATTITUDE
NOVEMBER 1992
FINAL
N = 500

"Hello, my name is YOUR NAME from Research and Polling, Inc., New Mexico's largest survey research company. We are conducting an important survey about legal issues. We would appreciate a few minutes of your time to answer a few questions, for which I will pay you $3, and I assure you we aren't selling anything."

"First, to make sure you qualify:"

A. "Are you a resident of the Albuquerque Metropolitan area?" *(Bernalillo County/Rio Rancho/Corrales)*

1. Yes
2. No *(thank and terminate)*

B. "Into which age category do you fit?" *(read categories)*

1. Less than 18 years *(thank and terminate)*
2. 18 to 34 years
3. 35 to 49 years
4. 50 to 64 years
5. 65 years and over
6. Won't say *(thank and terminate)*

C. "Do you or any member of your household work in the advertising or media industries?"

1. Yes *(thank and terminate)*
2. No
3. Won't say *(thank and terminate)*

D. "Do you or any member of your household work in the legal field?"

1. Yes *(thank and terminate)*
2. No
3. Won't say *(thank and terminate)*

E. "Are you a registered voter in New Mexico?"

1. Yes *(skip to question 1)*
2. No
3. Won't say *(thank and terminate)*

F. "Do you have a current New Mexico driver's license?"

1. Yes
2. No *(thank and terminate)*
3. Won't say *(thank and terminate)*

"Some lawyers routinely go to the police station and obtain the names and addresses of people involved in car accidents. They then mail letters asking the people involved in the car accidents to contact them about the accident so that the lawyer can represent them. I would like you to read a sample letter. Please take your time to read the letter carefully." *(POLLER: hand letter to respondent . . . wait until respondent has finished reading the letter.)*

"I would like to ask you a few questions about this letter. Please remember that there are no right or wrong answers. We are simply seeking out your honest reactions and opinions. Okay?"

1. "Let's say that you were in an automobile accident last week and you received this letter today. Would

your overall reaction to receiving this letter be positive or negative?" *(do not read categories)*

1. Positive *[32%]*
2. Negative *[58%]*
3. Neutral *(neither positive or negative) (skip to question 3) [7%]*
4. Depends on circumstances *(skip to question 3) [1%]*
5. Don't know/won't say *(skip to question 3) [1%]*

2. "Why do you feel that way?" *(do not read categories) (take up to 3 responses)*

POSITIVE

01. Well written/good letter *[4%]*
02. Aggressive attorney will be good lawyer *[3%]*
03. Makes it clear it's an advertisement *[1%]*
04. No/little out-of-pocket expense since the work is on contingency *[2%]*
05. I would need the name of a lawyer *[16%]*

NEGATIVE

08. Privacy issue/resent him knowing I was in car accident/where did he get my name *[21%]*
09. Do not want to be reminded of car accident/resent being bothered *[4%]*
10. Makes me mad/insulted *[6%]*
11. Makes lawyers/legal system look bad *[6%]*

06. Provides a lot of helpful information *[19%]*

07. Looks like an experienced lawyer *[1%]*

00. Shows concern *[1%]*

12. Makes lawyers look unprofessional/ambulance-chasers *[32%]*

13. People need to accept more responsibility for their actions *[1%]*

14. Drives up the cost of insurance *[2%]*

15. Encourages people to sue others *[11%]*

16. Quality of lawyer poor/trying to get more work *[6%]*

00. Would rather find my own lawyer *[4%]*

99. Don't know/won't say

Other POSITIVE *(specify)* _____

Other NEGATIVE *(specify)* _____

3. "If you were involved in a car wreck and a person in the car you collided with was injured, would you want that injured person to receive this type of letter from a lawyer?"

   1. Yes *[36%]*

   2. No *[54%]*

   3. Don't know/won't say *[10%]*

4. "Let's say a lawyer sent a letter to an accident victim, asking the accident victim to call that lawyer about handling his or her lawsuit. Let's also say that as a result of the letter the accident victim hired that

lawyer. What if during the trial the jurors were told that the accident victim had hired the lawyer in this manner. Do you think this would cause the jurors to award less money to the accident victim or not?"

1. Less money *[32%]*
2. No; not less money *[53%]*
3. Depends *(volunteered) [4%]*
4. Don't know/won't say *[10%]*

5. "Generally, do you think lawyers who write letters to accident victims usually have less experience, the same experience or more experience in trying car accident cases than lawyers who do not write letters to accident victims?"

   1. Less experience *[36%]*
   2. Same experience *[29%]*
   3. More experience *[26%]*
   4. Don't know/won't say *[9%]*

6. "Generally, do you think lawyers who write letters to victims of car accidents are less tough, the same, or more tough in their dealings with insurance companies than lawyers who don't write letters to the accident victims?"

   1. Less tough *[15%]*
   2. Same *[34%]*
   3. More tough *[40%]*
   4. Don't know/won't say *[12%]*

7. "Generally, do you think lawyers who write letters to victims of car accidents are less skillful, the same or more skillful in obtaining results for their clients

in car accidents than lawyers who don't write these letters?"

1. Less skillful *[30%]*
2. Same *[40%]*
3. More skillful *[21%]*
4. Don't know/won't say *[9%]*

8. "Generally, do you think lawyers who write letters to accident victims involved in car accidents are worse lawyers, the same quality or better lawyers than those who do not write these letters?"

1. Worse quality lawyers *[41%]*
2. Same quality lawyers *[41%]*
3. Better quality lawyers *[10%]*
4. Don't know/won't say *[8%]*

9. "Generally, do you think you will get a worse deal, same deal or better deal with a lawyer who writes letters to accident victims in car accident cases than with a lawyer who does not write letters to accident victims?"

1. Worse deal *[34%]*
2. Same deal *[34%]*
3. Better deal *[21%]*
4. Don't know/won't say *[12%]*

10. "Generally, do you think lawyers who write letters to victims of car accidents are less dedicated, the same or more dedicated to the interests of accident victims than lawyers who don't write these letters?"

1. Less dedicated *[38%]*
2. Same dedication *[36%]*
3. More dedicated *[23%]*
4. Don't know/won't say *[4%]*

11. "Do you think the Supreme Court, or whatever agency supervises lawyers, requires that lawyers who send letters to accident victims be experienced in the trial of automobile accident cases?"
    1. Yes *[54%]*
    2. No *[38%]*
    3. Don't know/won't say *[8%]*
12. "Have you been in a car accident which was reported to the police within the past 4 years?"
    1. Yes *[27%]*
    2. No *(skip to question 19) [72%]*
    3. Don't remember *(skip to question 19) [1%]*
13. "Was the accident in the Albuquerque area?"
    1. Yes *[82%]*
    2. No *[18%]*
    3. Don't remember
14. "Did you receive any unsolicited letters from lawyers after the accident?"
    1. Yes *[46%]*
    2. No *(skip to question 19) [54%]*
    3. Don't know/won't say *(skip to question 19) [1%]*

15. "How many letters did you receive from lawyers?

    8.3 *(exact response)*

    99. Don't remember

16. "Did any of the lawyers or their representatives follow up the letter with a phone call?"

    1. Yes *[34%]*
    2. No *[61%]*
    3. Don't know/won't say *[4%]*

17. "Did you contact any of those lawyers as a result of receiving the letter?"

    1. Yes *[10%]*
    2. No *(skip to question 19) [90%]*
    3. Don't know/won't say *(skip to question 19)*

18. "Did you hire any of these lawyers to represent you?"

    1. Yes *[57%]*
    2. No *[43%]*
    3. Don't know/won't say

"THANK YOU FOR YOUR PATIENCE, WE ARE ALMOST DONE. I WOULD LIKE TO ASK SOME QUESTIONS FOR STATISTICAL PURPOSES ONLY."

19. "What is the highest level of education you have earned?" *(read categories)*

    1. Less than high school graduate
    2. High school graduate
    3. Some college/Associate Degree

4. Vocational certificate
5. College graduate (4 years)
6. Graduate work or degree
7. Won't say

20. "Into which of the following categories does your total household income fit?" *(read categories)*
    1. Less than $10,000
    2. $10,000 to $19,999
    3. $20,000 to $29,999
    4. $30,000 to $39,999
    5. $40,000 and over
    6. Won't say

21. "Do you consider yourself to be Anglo, Hispanic, African-American, Native American Indian or of other descent?"
    1. Anglo
    2. Hispanic
    3. Black/African American
    4. Native American Indian
    5. Other
    6. Won't say

22. "What is the zip code at your residence?"

    _____ *(exact response)*

    POLLER: enter code number from pre-code list: _____

23. "So that my supervisor can verify my work, can you please tell me your telephone number?" *(poller: a phone number is extremely important)*

_____ *(exact response)*

POLLER: PAY PARTICIPANT

"For book keeping purposes, may I ask you to sign here indicating that you have been paid?

signature _____ *date* _____

"THIS CONCLUDES OUR SURVEY, THANK YOU FOR YOUR TIME, HAVE A GOOD DAY!"

NOTE TO POLLER, WAS RESPONDENT:

1. Male
2. Female

Poller Name _____

Poller Code _____

FOR STAFF USE ONLY

confirmed by _____

confirmation date _____ *time* _____

accuracy 10 9 8 7 6 5 4 3 2 1

courtesy 10 9 8 7 6 5 4 3 2 1

complete 10 9 8 7 6 5 4 3 2 1

comments _____

_____

_____

APPENDIX

The Revo Law Firm
Personal Injury Attorneys

Terrence Revo

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April 20, 1992

HELPFUL INFORMATION
ADVERTISING MATERIAL

Loretta Reinicke
3404 Palomas NE
Albuquerque, New Mexico 87110

Dear Ms. Reinicke:

Albuquerque Police records show that you were recently involved in an auto accident. Unfortunately, such accidents are an all too common fact of life and one that creates serious cause for concern. Dealing with injuries to your body, emergency rooms, medical bills, lost earnings, damaged auto, rental car, and insurance adjusters can be most difficult at a time when you're emotionally upset, confused and in pain. You know that you must do something, but wish that you didn't have to do it alone.

In our system of legal justice, the injured person has certain rights and protection given them under our Constitution and New Mexico State laws. It is vitally important that you know about your rights before deciding what to do.

As an attorney with fifteen years experience in personal injury law, I can help people injured by the negligent actions of others. I am committed to quality legal representation of my clients which includes education, service, and guidance. I invite you to make an appointment for a free initial consultation and evaluation of your case. We will do our best to answer all your questions and you are under no obligation to hire my firm.

I accept personal injury cases on a contingency fee basis, which means that my fee is based upon a percentage of your recovery; some costs may apply. I promise that your case will get the attention it deserves. I have found that the earlier I become involved in a case, the more I can do on your behalf, therefore, I urge you to call today.

If you have already retained the services of an attorney, I hope that your case will proceed well and that you have a positive outcome. If you are not represented, then I urge you to think about what is at stake, now and for the future, and call now.

Respectfully,

/s/ M. Terrence Revo
M. Terrence Revo

LAW FIRM MARKETING [LOGO]

Direct Mail Secrets From Richard Shapero

Richard Shapero offers the following advice to law firms that are thinking of starting their own direct mail effort:

- Don't use address labels. A labelled envelope – especially if the label is crooked – is a sure sign that the letter is not personal. It will be trashed.

- Avoid using a letterhead with too many names on top. The finely printed names discourage people from reading your message.

- Consider personalization. You can address a person by name two or three times in the letter if you wish. You can also discuss his injury and accident, thus customizing the letter for greatest impact.

- 'Bullet' important points in your letter. (In copywriting lingo, the dot at the start of this sentence is a bullet.)

- Make your letter look as official as possible. You really want it to look like they're getting sued.

- Carefully weigh where to put Bar-mandated disclaimers and notices. The disclaimer language often confuses people. Either work it into the copy so there's a natural flow, or stick it by itself as a postscript on the final page of your letter.

- Encourage the reader to act by including a coupon or other offer, by inviting him to call now for free information, or by offering a discount or a free gift. The sooner

the individual calls you, the less likely your message will be misplaced or thrown away.

- Use professionals. An ad agency will help hone some of the skills you have and add some skills you don't have.

- Test different packages. Divide your list alphabetically or by zip code or some other way and send different letters to different people. When people come to your office, check your records for their name or zip code to see which letter brought them in. Over a period of months you can develop some dynamite letters that work. Some go on working forever, while others seem to stop after six months or a year as times, attitudes and situations change.

- Try different writing styles. Different styles work in different markets depending on consumer attitudes, advertising trends and other factors. Various styles include doom and gloom ("Call me now or you may regret it later"), an appeal for justice ("Why should you pay for someone else's mistake?"), a conciliatory approach ("Please accept my sympathy for your unfortunate accident"), and others.

- Track your results. You never know why things work, but keep track of what works. Generally if it works once it will work again and again.

- Track your competition. When you, your clerk, secretary or paralegal goes to the police station to see who's been arrested, ask the clerk who else is coming by asking for this information. How often do they come? Do

they say it's working? You can find out what other lawyers are doing without having to ask the other lawyers.

• Consider teaming up with a chiropractor to work on mailing lists compiled from police records – which often note the type of injuries. If there are minor injuries, the chiropractor seeks them as patients. If there's blood and broken bones, you seek them as plaintiffs.

• If the police argue your right to view records, cite public records and open records laws. You do have a right to go to these things.

• For greatest speed, consider developing a mailing list from newspaper articles. Newspapers report this afternoon's accident the next morning. Although the most pertinent information comes from official records such as accident reports, collection suits, foreclosures suits, arrests, etc., it may be two or three days until you can get your hands on them. During the week it takes your letter to arrive, the person may have hired another lawyer.

• Use direct mail in conjunction with other advertising and results skyrocket. It's a defensive measure too. When other lawyers start sending out targeted letters, people will respond most strongly to those from the lawyer they've already heard of.

• Check those who didn't respond. Have your ad agency call them up and say it's conducting marketing research (they don't have to say it's for you). Have them ask, "Did you get letters from lawyers? How many? Did you hire anybody? Why or why not?" You'd be surprised – some people will flat out tell you what you did wrong.

A longer version of this article first appeared in *Law Firm Profit Report*, 1545 New York Avenue, N.E., Washington, DC 20002-1765. Tel.: 202-529-5700.

November 25, 1991